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NOTE FOR: [redacted]

FROM:

SUBJECT: Senate Floor Debate on S. 3076

During the Senate floor debate on S. 3076, the Department of State Authorization Legislation, on 28 June 1978, there was extended discussion of a "Treaty Powers Resolution." Senator Clark, the sponsor, inserted in the Congressional Record a Fall 1977 Foreign Policy article on Executive Agreements by Loch Johnson and James McCormick.

The article co-authored by Loch Johnson in general takes a very broad view of Executive Agreements -- i.e., that many more than at present should be sent to the Congress for prior approval as treaties -- and specifically mentions intelligence agreements as one category of "agreements" in which Congress does not -- but should -- have a voice. This is, in my view, an interesting viewpoint that we should keep in mind.

STAT [redacted]
Chief Legislative Counsel

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would never think of usurping congressional powers. This may well be true, and I sincerely hope that it is. But however strong that hope and however valid that belief, they regrettably afford no comfort when placed in historical perspective. For the evidence of decades of practice by many administrations—Democratic and Republican—demonstrates that the problem has been a recurring one which will not have been eliminated simply because one administration has chosen to respect constitutional limitations. It is the task of the Congress to legislate for the future, not simply the present.

At the risk of appearing an alarmist I would add that I am not nearly so sanguine as some of my colleagues about the intentions of this administration. Last week a major departure occurred from previous administration policy on a very similar subject—the warmaking power. Earlier, the administration had indicated that it did not challenge the constitutionality of the war powers resolution. During Secretary Vance's confirmation hearings before the Committee on Foreign Relations, he was asked by Senator JAVITS, "Do you or the new administration see any problem with the good-faith observance of that law?" Secretary Vance replied, "I do not." Senator JAVITS then asked, "Do you challenge it under the Constitution as to the President's power?" Secretary Vance responded, "No." The President himself took essentially the same position. In his March 5, 1977 "telethon," he said that the war powers resolution "is a reduction obviously in the authority that the President has had prior to the Vietnam war, but I think it is an appropriate reduction." And last summer, during hearings held before the Foreign Relations Committee on the resolution, we were told by the State Department Legal Adviser that the administration "is not challenging the constitutionality of the resolution" and "is not going to challenge the constitutionality."

This position, I regret to say, has now been abandoned by the administration. In his message to Congress last week on "legislative vetoes," the President said that "a Congress subsequently adopts a resolution to veto an executive action" which is, of course, the heart of the war powers resolution—"we will give it serious consideration, but we will not, under our reading of the Constitution, consider it legally binding." Attorney General Bell indicated the same day that the Justice Department would try to resolve the issue in the courts. Upon inquiries by the staff of the Foreign Relations Committee, it was made clear that the Attorney General's intent is to seek a court test of some less significant "legislative veto" and, in the process, try to convince the court to hand down a broad ruling which will sweep away more significant "legislative vetoes" such as those contained in the war powers resolution and the Arms Export Control Act.

So there is no great room, it seems to me, for us to take comfort in the administration's current intent to consult. Congress—and the Senate—should assume, I think, that if the administration truly intended to conduct its foreign activities so as to avoid confrontation, it would be operating within the limits set by the war powers resolution and treaty powers resolution and it would, therefore, not hesitate to endorse both wholeheartedly. But because the administration refuses to do so, it is not unreasonable to assume, I think, that it regards both as somehow imposing unwanted restrictions. That, it seems to me, is the strongest argument of all in favor of both measures being firmly in place.

I would also point out to my colleagues that Senator GLENN and I, on April 11, told the administration that we were considering going forward with this resolution and asked them to submit a proposal of their own to see whether something acceptable to both branches could not be worked out. No response was received—nothing. During the mark-up of this bill, that request was reiterated. Again, we have received no response. Only Monday, the staff of the committee again met with officials of the State Department and again sought to develop some compromise solution. And again, the administration was able to offer nothing more than a restatement of its intent to consult. This intent is deeply appreciated, and I say that sincerely, but there comes a point at which the ritualistic incantation of the word "consultation" must give way to a recognition that differences of opinion may not be resolved by mere consultation and that it is not inappropriate for either branch to establish a procedure for effectuating its own judgment.

The fourth and final argument made against this section is that, because it amends the Senate rules, it is within the jurisdiction of the Rules Committee. In my judgment, that is not so. It does not amend the Standing Rules of the Senate; rather, it amends the rules in a more generic sense, as do many other measures commonly reported from every committee. To cite only one of many examples, on the same day that this bill was reported, the Committee on Foreign Relations reported another bill—the ACDA authorization, H.R. 11832—which contains a jurisdictionally identical provision: It causes a point of order to lie in the Senate against any bill, joint resolution, or conference report containing certain program requests unless an arms control impact statement has been transmitted at least 7 days beforehand.

The sponsor of that provision was no less than Senator CLAIBORNE PELL, chairman of the Rules Committee and a man for whom I have the highest regard, particularly in his understanding of what is and is not within the jurisdiction of the Rules Committee. As a colleague of Senator PELL's on both committees, I have never failed to be impressed by his sense of fairness. I am certain that he would apply the same jurisdictional principles evenhandedly to both provisions.

To conclude, Mr. President, the issue before us today is one of principle. Justice Holmes said that the principle of free thought means "not free thought for those who agree with us, but freedom for the thought that we hate." I think a related principle is at issue here. I believe that constitutionalism means insistence on procedural safeguards for proposals we agree with, not simply for those we dislike. It also means insistence on procedural safeguards during administrations we support, not simply those we oppose. So I hope that our effort today will be perceived by neither the President nor the House as confrontational or devisive, but rather as a good-faith insistence that constitutional procedures be upheld by Democratic as well as Republican presidents, in times of political harmony as well as in times of political strife.

Mr. President, I yield to the distinguished Senator from Ohio.

Mr. GLENN. I yield to the Senator from New Jersey.

Mr. CASE. I am grateful, indeed, to my colleagues.

EXHIBIT 1

FOREIGN POLICY BY EXECUTIVE FIAT

(By Loch Johnson and James M. McCormick)

In the crucible of war, the Constitution may take on malleable properties. President Lincoln's expansive interpretation of the commander-in-chief clause during the Civil War is a case in point. More recently, World War II and the protracted cold war profoundly altered the shape of executive-legislative relations in the area of foreign policy: As the nation embraced strong leadership to thwart external threats, power shifted dramatically to the presidency.

This aggrandizement is reflected in the startling number of overseas military commitments since the end of World War II that have been grounded in claims of inherent executive authority. The executive branch has, among other things, placed military personnel in Guatemala, mainland China, Ethiopia, and Iran; pledged military support to Turkey, Iran, Pakistan, and, on the eve of war, South Korea; and contracted for military bases in the Azores, the Philippines, Lebanon, Diego Garcia, and Bahrein. In South Korea alone, over 30 commitments were made but never even reported to the Congress as required by law. Beneath this tip of the iceberg lies an expanse of executive discretion in peacetime foreign policy that reaches alarming proportions.

Between January 1, 1946 and December 31, 1976, the United States signed 7,201 agreements with other nations.[1] They dealt with a wide range of military, economic, cultural, technical, transportation, communications, and diplomatic issues. Approximately 6 percent of the international agreements reached during the 31-year period were formal treaties requiring Senate confirmation; 87 per cent were pursuant to congressional legislation (so-called statutory or congressional-executive agreements). But 7 per cent were so-called executive agreements, based partially or completely upon the presumed constitutional prerogatives of the executive branch.

The executive agreements represent a small percentage of the total, but many of them may be more significant than the treaties. The question arises: Has the Congress been excluded from decisions about crucial commitments abroad? While chairman of the Senate Foreign Relations Committee, J. William Fulbright (D.-Arkansas)

[1] This figure excludes secret agreements made by the United States. According to the Department of State, 63 secret agreements were reported to Congress between August 1972 (when the reporting requirement was established) and March 1977.

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vividly depicted the crux of the controversy: "The Senate is asked to convene solemnly to approve by two-thirds vote a treaty to preserve cultural artifacts in a friendly neighboring country. At the same time, the chief executive is moving military men and material around the globe like so many pawns in a chess game." More generally, the Foreign Relations Committee complained in a 1969 report about an imbalance: "We have come close to reversing the traditional distinction between the treaty as an instrument of a major commitment and the executive agreement as the instrument of a minor one." Since then, the trend has accelerated.

MILITARY TREATIES AND AGREEMENTS[2]

In this analysis we explore the treaty powers debate by focusing on U.S. military commitments abroad, for these obligations have proved to be particularly controversial.

Of the 7,201 international agreements signed in the 1946–1976 period, 1,235 (or 17.1 percent) related to military matters. An inspection of the content reveals two general types: substantive and administrative. Substantive military agreements deal with the creation of military alliances, the signing of peace treaties, the establishment of military bases, the disposal of military equipment, and the like. Administrative ones deal with secondary details, such as the establishment of a military headquarters based on an alliance, personnel staffing, and the like. For the purposes of this study, the substantive agreements are considered "significant," because they commit this country to specific policy positions; the administrative agreements are "insignificant," because they deal with housekeeping matters.

Among the 1,196 military commitments signed during the period from January 1, 1946 to August 9, 1974 (the day President Nixon left office), 42 (3.5 percent) were in the form of treaties, 1,003 (83.9 per cent) were statutory agreements, and 151 (12.6 per cent) were executive agreements. The texts of the 193 treaties and executive agreements were studied to assess their relative significance.

The finding, presented in Table 1, is that treaties in the post-World War II period have been used mainly for important military commitments, not for trivial matters. Of the 42 military treaties signed in the administrations from Presidents Truman through Nixon, 32 (or 76.2 percent) dealt with major defense obligations. Among them were various security arrangements with Japan, the Republic of Korea, and the nations of Western Europe; major arms control accords including the nuclear test ban treaty of 1963; and postwar peace treaties with former belligerents (for example, the Treaty of Peace with Italy). Ten of the treaties (23.8 percent) excluded from the "significant" category dealt with administrative details of major defense pacts—most notably the North Atlantic Treaty Organization (NATO). In short, the evidence—at least for defense commitments abroad—does not support the conventional wisdom that the advice and consent of the Senate has been requested by the Department of State largely for policies with little substantive meaning.

[2] We examine only the use of treaties and executive agreements, since they have become far more controversial than statutory agreements. Nonetheless, a separate study is warranted on the accuracy and validity of State Department claims for agreement-making authority based upon previous statutes, some of which may no longer reflect the original intent of Congress in a rapidly changing world.

TABLE 1.—*The dominance of executive agreements over treaties in the making of significant military commitments abroad, 1946–1974*[1]

Administration	Significant Military Treaties (T)	Significant Military Executive Agreements (EA)	Executive Agreement Index EA/T+EA
Truman	17	18	.51
Eisenhower	7	20	.74
Kennedy	1	3	.75
Johnson	4	13	.76
Nixon	3	19	.86
Total	32	73	

[1] This table summarizes the use of military treaties and executive agreements only; statutory agreements, which are more numerous but less controversial, are not analyzed here.

[2] The numbers in this column represent for each Administration the proportion of significant military executive agreements, compared to the total number of significant military treaties and executive agreements. This Executive Agreement Index ranges from 0 to 1; the higher the index, the greater the reliance on executive agreements for major military commitments.

However, the Senate Foreign Relations Committee may be close to the mark in complaining about the use of executive agreements for negotiating important military commitments. Although a majority of the 151 executive agreements dealing with military matters in the postwar period were indeed routine and minor (dealing with such issues as the establishment of a practice bombing range in West Germany and of reciprocal air rights with Canada for rescue operations), a striking number involved major commitments abroad. The following obligations were entered into partly or completely on the basis of an assertion of executive authority:

use of the Azores airbases by the United States (1947);

placement of U.S. troops in Guatemala (1947);

establishment of U.S. bases in te Philippines (1947);

placement of U.S. troops in mainland China (1948);

military security in the Republic of Korea (1949);

U.S. military mission in Honduras (1950);

broad U.S. military prerogatives in Ethiopia (1953);

U.S. military mission to El Salvador (1957);

U.S. military mission to Liberia (1958);

U.S. base rights in Lebanon (1958);

security pledges to Turkey, Iran, and Pakistan (1959);

military use of the British island Diego Garcia (1966);

military use of Bahrein (1971);

agreement terminating military and economic pact with Libya (1972);

agreement relinquishing land at U.S. Naval Communications Station in the Philippines (1973);

establishment of military mission in Iran (1974).

Almost half (73 of 151, or 48.3 percent) of the military agreements signed during this period represented significant commitments abroad which seemed to merit closer scrutiny by the legislative branch. Several of the commitments involved the establishment of overseas bases, a primary source of tension between the executive and legislative branches as the President asserts his authority under the commander-in-chief clause of the Constitution and the Congress sometimes resists what it perceives to be unwarranted military commitments.

As illustrated in Figure 1, the number of significant executive agreements has always been greater than the number of significant treaties since the Second World War. To estimate more precisely the extent to which significant military commitments have shifted from treaties to executive agreements, we constructed for each administration a simple Executive Agreement Index based upon the proportion of significant military executive agreements among the total number of significant treaties and executive agreements (EA/T + EA in Table 1). The index has been high throughout the post-World War II era. Clearly, most of the significant military commitments between 1946 and 1974 took the form of executive agreements. Moreover, the Nixon administration was by far the most vigorous claimant for presidential authority in military agreement-making.

Thus far, only the outlines of military agreement-making during the administration of President Ford are clear. Of the 32 significant military commitments made overseas by the United States between August 9, 1974 and the end of 1976, only two were in treaty form and the remaining 30 (94 per cent) were either statutory or executive agreements. Although the State Department has not yet distinguished publicly which of these 30 agreements were based upon presidential authority and which upon statutes, a tentative examination of their content indicates that as many as 18 (or 60 per cent) may have been executive agreements. If accurate, this figure would give the Ford administration an Executive Agreement Index of .90, slightly higher than that of the Nixon administration. (That the State Department has not yet come up with a legal justification for all of the military pacts signed under Ford is, in itself, a commentary on the difficulty faced by legislators and the public in trying to evaluate the legitimacy of international commitments.)

THE CONGRESSIONAL RESPONSE

Too often the executive branch has bypassed the Congress to make major military commitments abroad simply by signing an executive agreement. The Congress has long been generally aware of the problem, but its attempts to correct it have met with limited success. The primary congressional response has been to propose legislation in three different areas: to require the reporting of all executive agreements to Congress; to permit a congressional "veto" of unwarranted executive agreements; and to require either a positive majority vote in Congress for approval of military agreements (more than an opportunity to veto) or the mandatory use of the treaty-making procedure for "significant" international agreements.

Among these various attempts to restore congressional powers, legislation requiring the executive branch to report all executive agreements has been most successful, no doubt because it is the least demanding and controversial. The Case-Zablocki Act of 1972[3] requires the secretary of state simply to report to the Congress within 60 days "the text of any international agreement, other

[3] Senator Clifford Case (R.-New Jersey) is presently the ranking minority member of the Senate Foreign Relations Committee, and Representative Clement J. Zablocki (D.-Wisconsin) is chairman of the House International Relations Committee. Case, the popular, soft-spoken elder statesman of the Senate committee, is widely regarded as the chief architect of the rebuilding of congressional authority in the agreement-making area. His interest arose initially during the Vietnam war era out of despair over the failure of Congress to be aware of exactly what commitments were being made abroad by the executive branch.

that a treaty, to which the United States is a party. . . ."

This legislation represents a useful step toward an institutional sharing of power in foreign affairs. Since 1950 the Department of State has been required by law to report international agreements to the Congress. The Case-Zablocki Act shortened the deadline from the indefinite (sometimes the process took years) to 60 days. It also increased the awareness of the government (and, to a lesser extent, the public) of the executive agreement problem. Just as former Senator John Bricker (R.-Ohio) brought the treaty powers controversy to the nation's attention in the 1950s, the Case-Zablocki Act has had a similar, albeit less emotional, effect in the 1970s. The act helped considerably to control the government's looseness about making commitments abroad, for the State Department was now forced to improve its own reporting procedures and to pay more attention to the international negotiations of agencies throughout the government.

Despite these virtues, the imperfections of the Case-Zablocki legislation have become evident. The 60-day provision in the law still permits the executive branch to present the Congress with a fait accompli, leaving little or no legislative recourse to alter already completed negotiations. While the Congress now knows earlier about what happened, its ability to participate effectively is not much better than under the old reporting requirement. (Even now, the Department of State fails to meet the 60-day deadline, forwarding agreements as much as a year late.)

In any event, Congress has not done much with the international agreement reports sent to Capitol Hill by the State Department. "They just get filed away in drawers," says one exasperated State Department official who invests time in their preparation. "The reports come up here so late, we have to rely on contacts and leaks from the executive branch to find out when really important negotiations are underway." counters a frustrated Senate staff aide with foreign policy responsibilities. "The texts and the sketchy background statements accompanying the agreements are practically useless for someone trying to figure out the anticipated effect of the commitments."

Some of these shortcomings in the reporting system are a product of the severe strains placed upon the Office of Treaty Affairs in the Department of State. It is understaffed and has trouble meeting its new obligations under the Case-Zablocki Act. However, as a recent inquiry conducted by the General Accounting Office (GAO) suggests, the problem goes beyond the need for more analysts in the Office of Treaty Affairs. In February 1978, a GAO report noted that the transmission of executive agreements to the legislative suffered from significant omissions.

The report, which examined only American agreements with the Republic of Korea, documented more than 30 instances since the passage of the Case-Zablocki Act when agreements had not been sent to the Congress. Several dealt with military matters, such as the joint use of Taegu Air Base and the transfer of $37.6 million worth of military equipment to Korean forces. With classic bureaucratic understatement, the GAO investigators concluded: "We feel that certain arrangements identified in our study which were not transmitted to Congress . . . would have been of interest to that body had they been so transmitted."

The most alarming aspect of the GAO findings was that the Korean agreements were reported neither to the Congress nor to the Department of State. Clearly, government agencies—including the Department of Defense—have negotiated and transacted international agreements on an agency-to-agency basis without sufficient monitoring by the State Department itself, let alone by the Congress. Consequently, no one can know the extent of agency discretion in the making of international agreements until the reporting of them is more complete and reliable, supplemented with sample "audits" like the GAO probe into the U.S.-Korean agreements. In June 1978, Case introduced an amendment to the International Security Assistance and Arms Control Act to require "any department or agency of the United States government which enters into an international agreement on behalf of the United States . . . [to] transmit to the Treaty Office, Department of State the text of such agreement not later than 20 days after such agreement has entered into force." A year later, the provision became law as part of the State Department Supplemental Appropriations Bill.

An allied problem is the failure of the Case-Zablocki Act to require explicit notice from the executive branch to the Congress on more informal agreements, such as verbal "promises" or "understandings." Such agreements can be immensely troublesome and are often viewed by foreign governments as solemn commitments every inch as binding as formal treaties. Four recent examples illustrate this problem:

In 1973, Nixon sent a secret message to Pham Van Dong, premier of North Vietnam, promising postwar reconstruction aid in return for a peace agreement. The text of this message was not disclosed by the Department of State to the public or the Congress until May 19, 1977.

In 1975, Secretary Kissinger arrived at an "understanding" with Israel and Egypt over the question of a Sinai disengagement, which included the commitment of American personnel to serve as monitors in a region where military hostilities might have easily resumed with little warning. The "understanding" was declared by the State Department to be the proper exercise of executive powers, not a commitment appropriate for review by the treaty procedure.

In August 1975, the Helsinki accord was signed, boundaries in Europe and a freer flow of people and information between East and West. This declaration was sent to the Congress as a matter of "courtesy," but was never specifically reported under the Case-Zablocki requirements. The State Department reasoned that the accord was not a genuine international agreement, but only a "political statement of intent." In public hearings on March 29, 1977, members of the Senate Foreign Relations Committee made it clear they believed the Helsinki agreement should have been sent to the Congress under regular Case-Zablocki reporting requirements.

Intelligence agreements provide a rigorous test of executive branch reporting under the Case-Zablocki Act. Fragments of evidence suggest that some efforts have been made here to bypass the reporting requirements. For example, in 1975, the chief State Department legal adviser on intelligence agreements told a Senate judiciary subcommittee he had not yet determined whether six agreements between United States' intelligence agencies and their foreign counterparts were subject to the legislative reporting requirements. Moreover, according to a seasoned State Department specialist on treaty affairs, the intelligence agencies have shifted perceptibly to oral agreements since the Case-Zablocki bill, in order to avoid reporting these commitments to Congress.

In short, efforts to circumvent the reporting requirements of Congress have apparently been numerous and successful. Representative Les Aspin (D-Wisconsin) estimated in 1975 that some 400 to 600 of the international agreements concluded since passage of the Case-Zablocki Act had not been sent to the Congress, because the executive branch had redefined what needed to be reported to suit its own purposes. Others in Congress complain that the reporting legislation has specifically failed to elicit full cooperation in two particular areas: agreements on sensitive intelligence sharing and on the storage of nuclear weapons overseas. At the heart of the matter, then, is the question of which commitments abroad, if any, ought to be sheltered under the protective covering of executive privilege, and which ought to be reported to Congress (or some part of Congress) in a public or, if necessary, classified form.

A second avenue used by Congress to control executive agreements has been to resort to a congressional veto device. With this procedure, the Congress includes within a bill specific language allowing it to disapprove executive action pursuant to the legislation within a specified time period. This concept is embodied in the War Powers Resolution of 1973 and the Budget and Impoundment Act of 1974. This technique has long been employed by the Congress to monitor the power of the president to merge or reorganize executive agencies.

A recent Library of Congress report cites three pieces of legislation that used this approach to regulate international agreements: the Atomic Energy Act of 1954, the Trade Act of 1975, and the Fishery Conservation and Management Act of 1976. Each one contains a provision giving Congress the right to disapprove within 60 days any agreement made pursuant to the legislation. There is similar language in the present law on arms sales, as a result of amendments introduced by Senator Gaylord Nelson (D.-Wisconsin) and Representative Jonathan Bingham (D.-New York) to the 1974 Foreign Assistance Act. Any intended sale of defense articles or services worth $25 million or more, or of major defense equipment costing $7 million or more, must be reported to the Congress.* Under the Nelson-Bingham provision, Congress may then disallow sales by a majority vote in either chamber within 30 days.

Some legislative proposals have recommended that all executive agreements be subject to congressional veto. One of the earliest proponents of this view was former Senator Sam Ervin (D.-North Carolina). In 1972, 1973, and 1974, Ervin introduced a bill requiring a 60-day delay before any executive agreement entered into force—and it would take effect then only if Congress had not voted it down by means of a simple concurrent resolution. The Ervin bill passed the Senate in November 1974, only to die in the House without a vote. The same bill was reintroduced by Senator Lloyd Bentsen (D.-Texas) in 1975, and variations on the idea were also advanced by Senator John Glenn (D.-Ohio) and former Representative Thomas Morgan (D.-Pennsylvania), while he was chairman of the House International Relations Committee. Hearings have been held periodically in both houses on these proposals, as well as on the more general problem of executive agreements, but as yet no bill has matched even the partial legislative success of Ervin's 1974 effort.

The primary drawback of the congressional veto approach is that it invites delay and obstruction. Power is highly fragmented in the Congress; consequently, piecing together successful coalitions is time-consuming and frustrating. Failure is far more common than success. Moreover, the veto approach is a rather blunt instrument, capable of wiping out a broad and painstakingly devised agree-

*This requirement excluded the controversial proposal to sell relatively inexpensive but highly destabilizing concussion bombs to Israel, first approved by Ford and later disapproved by Carter.

ment (say, military assistance to an entire region) when perhaps only a single aspect of the total package is unacceptable to Congress (say, a specific weapons system going to a particular country). Such sweeping acts of congressional desperation could wreak havoc on the conduct of American foreign policy. Additionally, the thrust of the legislative veto approach puts the burden to act upon the Congress rather than the executive.

Why should the onus be placed upon the legislative branch to undertake the uphill political task of mobilizing a majority to stop an ill-conceived commitment initiated by the executive? If the executive branch has negotiated an important new commitment overseas, why should it not be required to achieve a positive majority vote on its own behalf in the Congress before the agreement takes effect?

Focusing on the limited but important area of overseas military installations, Case advanced the principle in 1973 that Congress should require positive legislative approval of such international commitments before they can be established—not just provide an opportunity to muster a difficult negative veto. Case attached an amendment to the Department of State authorization bill stating that no funds could be used to carry out any agreement establishing a military installation abroad until the agreement was approved either by a concurrent resolution of Congress or by the treaty process in the Senate. The amendment passed the Senate and the conference committee, but the House rejected it. In 1974 a similar amendment was added to the Department of State authorization bill but was subsequently lost in conference.

Stronger still is the remedy offered by Senator Dick Clark (D.-Iowa) through his "Treaty Powers Resolution," first introduced in 1976. This legislation seeks to express the sense of the Senate that any "significant" international agreement should be cast as a treaty and thus should be submitted to the Senate for its advice and consent. The resolution was introduced again in January 1977, with Senators Frank Church (D.-Idaho) and Edward M. Kennedy (D.-Massachusetts) joining Clark as cosponsors. Ironically similar in intent to the conservative Bricker Amendment of an earlier era, the Clark resolution represents an initiative from a more liberal camp (whose views on the virtues of presidential power were revised in the agony of the Vietnam war) to limit the authority of the chief executive to commit the United States abroad.

In the Clark bill, the Senate Foreign Relations Committee would help the president determine whether a particular international agreement should be submitted as a treaty. Section 4 of the proposal bears sharp teeth: If the executive fails to submit an agreement which the Senate decides by resolution should have been submitted for ratification as a treaty, then the Senate rules will declare it henceforth out of order "to consider any bill or joint resolution or any amendment thereto, or any report of a committee of conference, which authorizes or provides budget authority to implement such international agreement." The money spigots would remain shut off until the Senate gave its advice and consent to ratify the agreement in dispute.

A number of tangles in the Clark proposal have yet to be worked out. First and foremost is the problem of definition. What kinds of agreements are "significant" enough to be treaties? Despite the difficulties, the proponents of the Clark resolution must develop at least a rough set of guidelines to help delineate between significant international agreements and less important ones. These guidelines need not—and cannot—be definitive or set in concrete; at best, they would represent only the tentative opinions of a panel of experts. To a large extent, decisions would have to be particularistic, de-[illegible] reason would have to be followed. In some cases disagreement may well—and properly—lead to extended debate on the appropriate way to proceed if the country is to make a commitment abroad.

Obviously, in the drafting of guidelines, quantitative rules alone will be insufficient. Who is to say whether 325 million or 500 soldiers sent abroad mark the beginning of a "significant" commitment? Just one platoon of American Marines sent to Africa or the Middle East would likely have a profound impact. An overriding principle for the establishment of guidelines might be that any new commitment or departure from existing policy would require the advice and consent of the Senate. (This would include "negative" decisions to end commitments as well as "positive" decisions to begin new ones.) Whether a change in policy should go through the treaty procedure, become a statutory agreement, require some form of legislative resolution, or simply be accepted as an executive agreement would be a determination to be made by the Senate Foreign Relations Committee or possibly the full Senate, under the terms of the Clark bill. But should be senators cry "treaty" while the president cries "executive agreement," the country could have a major debate on its hands—and perhaps, in particularly serious cases, a constitutional crisis as well.

To permit an effective appraisal of international agreements by the Senate under the Clark resolution, the executive branch would have to be required to submit more specific information about the anticipated nature of a commitment (as is now required for arms sales proposals). Approximate dollar estimates on the cost of a commitment and an impact statement on its long-range implications should supplement the present reporting requirements. Furthermore, if an agreement were being negotiated pursuant to prior legislation (by far the largest percentage of our present international agreements are), the executive should be required to provide precise citations of prior legal authority. In this way, Congress can scrutinize the claim of authority and determine if its original decision is still valid and applicable.

Another intramural difficulty that the legislative branch will have to face is the relative role of the House and the Senate in the approval of international agreements. Secretary of State Dulles noted in 1953 that an "undefined and probably undefinable borderline [exists] between international agreements which require two-thirds Senate concurrence, but no House concurrence, as in the case of treaties, and agreements which should have the majority concurrence of both chambers of Congress." One thing is certain: members of the House, and especially the members of the House International Relations Committee, are increasingly eager, not to say avid, to pay a part in reviewing international commitments. Their claim is based in part upon the constitutional budgetary authority provided to their chamber. This argument cannot be easily dismissed, in light of the millions of dollars that may be expended as a result of any treaty or less formal agreement. Key members of the Senate Foreign Relations Committee, however, are prepared to fight over this issue. "If they begin now to intrude on the treaty-making power of the Senate, we are going to find ourselves in a position where we can't do anything without the House's consent," observed Church, the ranking Democratic member of the committee, recently. "Their nibbles end up being big bites, and we being bitten to death."

Almost 200 years ago, Thomas Jefferson discussed this problem with President George Washington in reference to a proposed Algerian treaty. The Founding Fathers pondered what would happen if the House refused to appropriate funds to finance a treaty obligation enacted by the Senate. According to Jefferson's notes on the meeting, the president concluded that if the members of the House "would not do what the Constitution called on them to do, our government would be at an end, and must then assume another form."

LIMITING EXECUTIVE DISCRETION

As the foregoing discussion suggests, there is a continuum of approaches available to the executive branch in the making of international agreements. These range from complete executive discretion through secret verbal or written assurances to another country (for example, Nixon's promise of aid to North Vietnam and various intelligence agreements) to commitments made through the formal treaty process with Senate participation (obvious examples are the NATO treaty and the nuclear test ban treaty). It is the gray middle area between executive authority and institutional sharing which has been particularly controversial in seeking limits to executive discretion.

The controversy surrounding the Sinai agreements of September 1975 between the United States, Israel, and Egypt demonstrates this middle-range difficulty. These agreements established an early warning system to help keep the Mideast peace and called for American technicians to assist in its operations. They became controversial because some members of Congress believed the agreements should have taken the form of treaties, since they involved American personnel in an area of potential future conflicts. The executive branch argued through the State Department Legal Adviser, however, that while the president does not have "unlimited discretion in choosing between treaties and executive agreements . . . in 200 years of constitutional interpretation and practice [there has never] been a clear line between treaty and executive agreement . . ." Therefore, ". . . . there is no legal rule requiring that the Sinai agreements in question should have been submitted as treaties."

But perhaps because of the controversy surrounding the placement of American technicians in a war-ready zone, the executive branch ultimately did not discharge the commitment solely by executive authority. In the final text of the Sinai accords, Ford wrote to the presidents of Israel and Egypt that "as soon as the Congress of the United States has given its approval to United States participation in the Early Warning System, I will notify you, and this proposal shall be regarded as an agreement between us." What some wanted to be a treaty and others an executive agreement finally became a statutory agreement in order for the Congress to give its approval to the commitment.

Yet with the precedent of the Gulf of Tonkin Resolution in mind, the legislators did not grant open-ended language in their approval. The Sinai resolution specified that the congressional approval of American technicians in the Middle East did not imply approval of any other agreement, understanding, or commitment that might have been made at the same time, secretly or verbally, by executive branch. Congress, moreover, required the president to submit reports at least every six months, so long as the American technicians were still on duty, on the scope and duration of their participation.

As the Sinai example suggests, disagreements continue to arise over the appropriate form that international agreements should take. No doubt Bricker was correct that "it is probably impossible to draw a satisfactory line of demarcation even in a statute" between treaties and executive agreements. But most members of Congress seem less concerned today with the estab-

lishment of a fine and everlasting dichotomy between these two forms of agreement-making than duly are with gaining assurances that the Congress will be informed in a timely fashion about all international agreements and provided adequate opportunity to judge whether a commitment is sufficiently important to deserve broader congressional participation in this decision-making process, either through a treaty or some other form of legislative involvement.

Our judgment is that virtually all international agreements, from verbal promises (which should be used only rarely) to open, written agreements, should be reported to the Congress, and early enough to allow serious congressional appraisal before the commitment is sealed. Confidential discussions between heads-of-state are a different matter. Executive privilege must extend to these discussions, just as it does to talks between the president and his aides, if we are to have frank and meaningful relations with other countries. However, once general discussions reach a stage of promised commitments, our diplomatic negotiators and representatives must be obliged to make it known that whatever commitments are agreed upon, oral or written (in contrast to the free exploration of options and possibilities), must be communicated to the Congress. If the commitments are of a sensitive nature, they will be protected in both branches under secrecy provisions, as has been the rule under the Case-Zablocki Act.

As Senator Hubert H. Humphrey (D.-Minnesota) told Secretary of State Cyrus Vance in public hearings on the eve of his trip to the Middle East earlier this year, "Don't make any commitments until you've been back here [to Congress]—not even smiling ones." It is not a mater of violating executive privilege, but of who can genuinely commit the United States to what. Here members of the Congress believe they have a legitimate right to participate; and they know that the first prerequisite for participation is awareness.

Congress needs to review U.S. commitments abroad in a more meaningful way. Congress may be seen as a collectivity of public policy specialists; by interest, training, or committee experience, some congressmen have specialized in foreign policy. Legislation like the Clark resolution seeks to interject these congressional experts into the process by which the United States establishes, or withdraws from, obligations in other lands. But the Congress provides more than just another arena of expertise; even more important is its sensitivity to public opinion and what might be acceptable foreign policy commitments to the American people. Why should the president and his assistants alone decide what is legitimately an executive agreement or a treaty; what is trivial or significant; what should be done quietly or with full debate? Why should not both the Congress and the executive branch play a part in this important process?

Of course, full participation by both branches may lead at times to controversy, and even confrontation. The alternate suggestion found in myriad books and articles on executive-legislative relations is greater consultation and comity, not new laws and procedures. This sounds like a reasonable suggestion; certainly no one is against the idea of the executive branch consulting more with the Congress and developing friendlier relations. The only trouble is that this informal approach does not often work.

"In the interest of orderly procedures," opined Dulles when he was secretary of state, "I feel that the Congress is entitled to know the considerations that enter into the determinations as to which procedures are sought to be followed. To that end, when there is any serious question of this nature and circumstances permit, the executive branch will consult with appropriate congressional leaders and committees in determining the most suitable way of handling international agreements as they arise." Yet the Congress was not consistently consulted in the 1950s (certainly not by Dulles), and it has been sporadically ignored in the 1960s and 1970s, too. That is why many members of the legislative branch want to go beyond a hit-or-miss reliance on occasional consultations and feelings of comity to develop a more formal, systematic, and reliable reporting and reviewing procedure for international agreements.

Reflecting upon his career, former Speaker of the House Carl Albert (D.-Oklahoma) said in an interview shortly before he retired last year that the restoration of congressional budgetary responsibility through the Budget and Impoundment Act of 1974, and of war-making (or preventing) responsibility through the War Powers Act of 1973, represented the two major accomplishments of the Congress in his memory.

Will this congressional reassertion extend to the agreement-making powers? An examination of the public statements made by members of the congressional committees on foreign policy indicates a resounding yes. As Case has said, "I think we should take back the full treaty power, and I'm not sure I won't have to join Senator Clark . . . in a crusade." How Carter will react to this crusade remains to be seen. He entered office with an ambivalence toward Congress on foreign policy issues that is characteristic of many presidents. Fresh from victory, the president-elect met with the Senate Foreign Relations Committee for the first time on November 23, 1976. "There will be times," he said, "when nobody needs to know about a foreign policy challenge except me and the secretary of state, or sometimes perhaps just me and the head of a foreign government." Yet at the same meeting, he also said, "My inclination is whenever possible to share the knowledge that I have with you and to seek your advice and counsel. I will go a second mile to meet you on this." Executive authority versus institutional sharing. It will be an important choice for this president, as it has been for others, when major military commitments are made abroad.

UP AMENDMENT NO. 1371

Mr. CASE. Mr. President, I have an amendment at the desk which I call up at this time and ask to have considered.

The PRESIDING OFFICER. The clerk will state the amendment of the Senator from New Jersey.

The legislative clerk read as follows:

The Senator from New Jersey (Mr. CASE) proposes unprinted amendment No. 1371.

Mr. CASE. Mr. President, I ask unanimous consent that further reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

On page 52, line 19, strike section 502, and insert in lieu thereof:

APPROVAL OF CERTAIN INTERNATIONAL AGREEMENTS

SEC. 502. (a) This section may be cited as the "Treaty Powers Resolution".

(b) This section—

(1) is enacted as an exercise of the rulemaking power of the Senate and as such is deemed to be a part of the rules of the Senate;

(2) supersedes other rules of the Senate only to the extent that it is inconsistent therewith;

(3) shall be deemed to be a resolution of the Senate and shall take effect upon the date of passage of this bill by the Senate; and

(4) may not be construed as derogating from the constitutional right of the Senate to change its rules at anytime, in the same manner and to the same extent as any other rule of the Senate.

(c) It is the purpose of this Resolution to fulfill the intent of the Framers of the Constitution and to ensure, through use of the rulemaking and legislative power of the Senate that the President seek the advice of the Senate in determining whether an international agreement should be submitted to the Senate for its advice and consent as a treaty.

(d) The Senate finds that—

(1) article II, section 2, clause 2 of the Constitution empowers the President "by and with the advice and consent of the Senate to make treaties, provided two-thirds of the Senators present concur";

(2) the requirement for Senate advice and consent to treaties has in recent years been circumvented by the use of "executive agreements";

(3) the Senate may refuse to consider legislative measures to authorize or appropriate funds to implement those international agreements about which it has not been consulted with respect to whether any such agreement should be submitted to the Senate for its advice and consent as a treaty; and consent to ratification; and

(4) article I, section 5, clause 2 of the Constitution grants to the Senate plenary power to "determine the rules of its proceedings".

(e) It is the sense of the Senate that, in determining whether a particular international agreement should be submitted as a treaty, the President should, prior to and during the negotiation of such agreement, seek the advice of the Committee on Foreign Relations.

(f)(1) Where the Senate, by resolution, expresses its sense that the President has not sought the advice of such committee with respect to whether a given international agreement, hereafter entered into, should be submitted to the Senate for its advice and consent as a treaty, it shall not thereafter be in order to consider any bill or joint resolution or any amendment thereto, or any report of a committee of conference, which authorizes or provides budget authority (including budget authority for salaries and administrative expenses) to implement such international agreement.

(2) Any such resolution shall be privileged in the same manner and to the same extent as a concurrent resolution of the type described in section 5(c) of the War Powers Resolution is privileged under section 7 (a) and (b) of that law.

(3) No point of order may be made pursuant to a resolution adopted under paragraph (1) of this subsection—

(A) after such date as the Senate has given its advice and consent to ratification of such agreement as a treaty;

(B) in the event such resolution is adopted later than sixty days after the transmittal of such agreement under section 112b of title 1, United States Code; or

(C) with respect to any international agreement which has been expresly authorized by statute or treaty which takes effect prior to the date on which such agreement takes effect.

(g) Any (1) committee of the Senate which reports any bill or joint resolution, and (2) committee of conference which submits any conference report to the Senate, authorizing or providing budget authority to implement any such agreement, shall indicate in the committee report or joint statement filed therewith, as the case may be, that such budget authority is authorized or provided in such bill, resolution, or conference report.

(h) It is the sense of the Senate that the Secretary of State should transmit—